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NO. 87-1245

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1987

TEXAS MONTHLY, INC.,
Appellant

vs.

BOB BULLOCK, Comptroller of Public Accounts of the State of Texas, JIM MATTOX, Attorney General of the State of Texas, and ANN RICHARDS, Treasurer of the State of Texas,
Appellees.

ON APPEAL FROM THE COURT OF APPEALS,
THIRD SUPREME JUDICIAL DISTRICT
OF TEXAS, AT AUSTIN

BRIEF FOR APPELLEES

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BRIEF FOR APPELLEES

STATEMENT OF THE CASE

In seeking to recover the sum of $149,107.74 paid under protest by it, Texas Monthly Inc., hereinafter called Texas Monthly, has appealed a decision of the Court of Appeals, Third Supreme Judicial District, Austin, Texas, holding that Section 151.312, Texas Tax Code, does not violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and the Free Press, Free Speech and Establishment Clauses of the First Amendment of the United States Constitution.

Texas Monthly publishes a general interest magazine, Texas Monthly, on a monthly basis. It has

challenged Section 151.312 by making tax payments for the period from January, 1985 through November, 1985 under protest pursuant a state law procedure, Tex. Tax Code Section 112.051. It contested the tax it reported on its monthly tax reports as the reports became due. The amount represents tax due on Texas Monthly's subscription sales of magazines. These sales were for a semiannual or longer period of time. The tax was not collected by Texas Monthly from its customers because it made a business decision that it was not economically feasible to collect the tax. J.A. 153, 154.

Before October 2, 1984, subscription sales of magazines sold for a semiannual or longer period and entered as second class mail were exempt from the application of the Texas sales and use tax. Section 151.320, Texas Tax Code. Effective October 2, 1984, the exemption for these sales was repealed and they became subject to the sales and use tax. Sales of magazines from a newstand were subject to tax, both before and after October 2, 1984.

Effective October 1, 1987, an exemption for magazines was enacted and appears again as Section 151.320 in the Texas Tax Code. Subscription sales of magazines are therefore currently exempt. Between October 2, 1984 and September 30, 1987, the only exemption for magazines, which were sold, appeared in Section 151.312, the religious periodical exemption. From October 2, 1984 through September 30, 1987 all sales of magazines were taxable under the Texas Sales and Use Tax Act except for sales of religious periodicals.

Texas Monthly in its brief indicates that sales of its magazines from a newstand have been and continue to be subject to state sales and use tax. The sales of these magazines were made by Texas Monthly to

retailers, who in turn sold the magazines to customers. The retailers collected the tax. J.A. 122. Since they were sales for resale, Texas Monthly was not responsible for and did not collect the tax on sales of its magazines from newstands. J.A. 138, 139.

The tax Texas Monthly seeks to recover relates only to subscription sales of magazines in 1985. On and after October 1, 1987 Texas Monthly owes no tax on any of its magazine sales.

For the period in issue, Texas sales and use tax was due from all sellers of tangible personal property including magazine publishers. It was imposed on each sale of tangible personal property in Texas and upon a seller engaged in business in Texas who made a sale for storage, use or consumption in the state. Texas Tax Code Sections 151.051(a), 151.010 and 151.103. Sellers making sales were required to bill and collect the tax from their purchasers. Texas Tax Code Sections 151.052 and 151.103.

The trial court ruled in favor of Texas Monthly concluding that the exemption in Section 151.312 violated the First and Fourteenth Amendments of the United States Constitution. J.S., App. 47. It made findings of fact that there were periodicals that qualify under the language in Section 151.312 as religious publications which are regularly circulated in Texas and there was no basis for the exemption of such periodicals other than the promotion of religion itself. J.S., App. 46, 47.

The trial court did not find the evidence established that the sales and use tax system in Texas operates to discriminate against magazines selling to subscribers in general and Texas-based publishers in particular. Texas Monthly raised as an issue in its

Second Amended Original Petition that the Comptroller had entered into an intentional plan to collect sales tax from only those magazines that had offices in Texas, such as Texas Monthly, and was making no effort to collect sales tax from companies selling magazines in Texas, which had no offices in Texas. J.A., App. 6. It also asserted as a ground of recovery that the imposition of tax on magazine subscription sales discriminated in its operation against the magazine industry since there was no effective way to collect the tax from readers and the tax operated as a gross receipts tax as it affected magazines sold through mail subscriptions. J.A., App. 7.

In its judgment, the trial court held, "Since the Court has concluded that because the legislature has exempted periodicals described in Section 151.312 from the tax and not exempted Plaintiff's periodicals, collection of the tax from Plaintiff violated the Constitutions of the United States and Texas. It is therefore unnecessary for it to make findings of fact and conclusions of law on the other issues raised by Plaintiff's pleadings and none are made." J.S., App. 44.

An appeal was taken by the Appellees to the Court of Appeals, Third Supreme Judicial District, Austin, Texas. The Court of Appeals held in a majority decision that Section 151.312 did not violate the Fourteenth Amendment equal protection clause by unconstitutionally discriminating between periodicals based on content. It also decided that Section 151.312 did not violate the free press and free speech clauses of the First Amendment of the United States Constitution. The Court of Appeals addressed the establishment clause of the First Amendment, but only as a part of its equal protection analysis. J.S., App. 4. The Court of Appeals refused to address Texas Monthly's other discrimination arguments because Texas

Monthly had failed to properly raise these issues for appellate review. J.S., App. 11, 12.

SUMMARY OF ARGUMENT

I. Texas Monthly lacks standing to attack Section 151.312. The tests for standing are the party invoking the court's authority must show first he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant and second the injury fairly can be traced to the challenged action and is likely to be redressed by a favorable decision. *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 472 (1982). Even if this court should find that Section 151.312 is unconstitutional, this holding should not offer the relief Texas Monthly seeks, which is the recovery of the amount paid to the Comptroller. Texas Monthly's injury, if any, is only for a limited period of time and is not continuing. If Section 151.312 is declared unconstitutional, the exemption provision should be held invalid but the tax should stand. Texas Monthly's constitutional attack on Section 151.312 does not hold the promise of escape from the burden of the tax itself and Texas Monthly lacks standing to challenge Section 151.312.

II. The Texas tax is not discriminatory. Under the Texas Sales and Use Tax Act, sellers of tangible personal property must add the tax to the sales price of the property and collect it from their purchasers.

During the period in issue, all sellers of magazines and other periodicals were required to collect and remit tax on their sales except sellers of religious publications.

There is no selective content based taxation of certain magazines by taxing all but one type of magazine. For content discrimination to apply to a tax provision, the press must be singled out for different treatment from other enterprises or a small group of the press must be targeted by the tax. The Texas tax does not treat the press as a whole differently from other sellers and it does not target a small group within the press for taxation. *Arkansas Writers' Project Inc. v. Ragland*, 107 S.Ct. 1722 (1988).

Unlike the tax in *Arkansas Writers' Project Inc. v. Ragland,* supra, which was discriminatory, the Texas tax does not discriminate. The Texas tax provides for a single religious exemption, which the Legislature has found to be useful to accommodate religion, to reinforce the desired separation of church and state (it provides neutrality toward religion), to attempt to avoid excessive entanglements with religion and violations of the Free Exercise Clause.

If this Court finds content based discrimination under the Texas Sales and Use Tax Act, the Comptroller submits this decision cannot be reconciled with previous decisions of the Court and should be overruled for the reasons discussed by Justice Scalia in his dissent in *Arkansas Writers' Project v. Ragland*, supra.

III. Section 151.312 does not constitute a "law respecting the establishment of religion." The Constitution mandates accommodation of all religions. The purpose of Section 151.312 is to accommodate religion. If accommodation is not afforded, there can be intrusion on the state's interest in promoting the First Amendment's guaranty of free exercise of religion.

This exemption meets the three part test set out in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). It

has a secular legislative purpose of accommodating religion neutrality toward religion. It restricts the fiscal relationship between church and state and reinforces the desired separation insulating each from the other. *Walz v. Tax Commission*, 397 U.S. 664, 676 (1970).

It neither advances nor inhibits religion but creates only a "minimal and remote involvement between church and state and far less than taxation of churches." A law is not unconstitutional simply because it allows churches to advance religion. Section 151.312 does not present a symbolic union endorsing religion.

It does not create an excessive entanglement with religion. The reviewing of a book to determine its content, if this must be done, does not violate the third part of the *Kurtzman* rule any more than determining whether property is being used exclusively for religious purposes by a religious organization. *Mueller v. Allen*, 463 U.S. 388 (1983) and *Walz v. Tax Commission*, supra. There is no continuing state surveillance in the review of a periodical to run afoul of the third standard.

The agency interpretation of Section 151.312 should be considered. This interpretation has been to let the parties to a sale transaction determine whether the publications are exempt.

ARGUMENT

I. APPELLANT LACKS STANDING TO ATTACK SECTION 151.312.

Texas Monthly seeks to recover the amount of $149,107.74 paid under protest to the Comptroller. Texas Monthly has attacked an exemption and not the tax.

Section 151.312 is a part of the Texas Tax Code. The Texas tax statutes were codified into this Tax Code in 1982 by the 67th Legislature. The Code, when enacted, did not contain a provision for severability. The Texas Code Construction Act, which appears in the Texas Government Code, applies to the Tax Code[1] and provides in Section 311.032(c):

> (c) In a statute that does not contain a provision for severability or nonseverability, if any provision of the statute or its application to any person or circumstances is held invalid, the invalidity does not affect other provisions or applications of the statute that can be given effect without the invalid provision or application, and to this end the provisions of the statute are severable.

Under these state statutory provisions if Section 151.312 is invalidated, this Section should fall and not the tax because the tax could be given effect without the exemption. Even if these provisions were not present, the exemption and not the tax should be invalidated. "The cardinal principle of statutory construction is to save and not to destroy." *Tilton v. Richardson*, 403 U.S. 672, 683 (1971). There is no basis for invalidating the tax because the tax is nondiscriminatory on all magazine sellers.

Texas Monthly admits in its brief (Appellant's Brief, p 16) that it is the exemption and not the tax

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[1]Section 311.002 provides:

This Chapter applies to:

(1) each code enacted by the 60th or a subsequent legislature as part of the state's continuing statutory revision program.

which gives rise to examination. To strike the tax and make all periodicals (except over the counter sales) exempt would defy logic. If the offending provision is the exemption, it should be invalidated.

In *Arkansas Writers' Project Inc. v. Ragland*, supra, the standing of the taxpayer to attack the tax statute was raised by the Commissioner of Revenue, the taxing authority. This court determined Arkansas Writers' Project had standing to challenge the Arkansas tax scheme because it had alleged a sufficient personal stake in the outcome of the litigation and its constitutional attack was its only means of relief from the burden of the tax.

This court in *Valley Forge Christian College & Americans United for Separation of Church and State*, 454 U.S. at 472, set out the tests for standing of a party as first, the party must show he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant and second, the injury fairly can be traced to the challenged action and is likely to be redressed by a favorable decision. Texas Monthly asks this court to declare Texas Tax Code Section 151.312 unconstitutional and allow it to recover the money it has paid to the Comptroller. With the change in the Texas tax scheme, the redress requested by Texas Monthly is only for a limited time period and cannot be requested for periods after September 30, 1987, which is unlike the situation in *Arkansas Writers' Project* where the challenged statute was still operative. Texas Monthly's attack is to the exemption in Section 151.312. Even if this exemption was invalidated as being in violation of the Constitution, the tax itself should stand. One exemption from an otherwise equal tax should not invalidate the tax if the exemption is held to be invalid. Texas Monthly should have no right to recovery of the money it paid

the Comptroller by seeking to invalidate the exemption.[2]

II. THE TEXAS SALES AND USE TAX SCHEME DOES NOT UNCONSTITUTIONALLY DISCRIMINATE BETWEEN PERIODICALS BASED ON CONTENT.

The freedoms of press, speech and religion are in a preferred position. *Murdock v. Commonwealth of Pennsylvania*, 319 U.S. 105 (1943). All these interests must be aligned and analyzed in order to resolve the issues raised in this appeal.

Texas Monthly's Free Press and Free Speech claims regarding Texas Tax Code Section 151.312 are blended with its claims under the Equal Protection Clause. Texas Monthly argues that Section 151.312 grants or withholds a tax benefit and therefore discriminates based on a publication's content.

The two recent cases from this Court addressing tax impositions and the Free Press, Free Speech and Equal Protection Clauses are *Arkansas Writers' Project Inc. v. Ragland, supra, and Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983). In these decisions, this Court intertwined the taxpayers' First Amendment claims with their interests under the Equal Protection Clause in reaching its decision.

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[2]Even if the Court decides its standing analysis is wrong, the Comptroller asserts Texas Monthly should not be entitled to recover the amount it paid if Section 151.312 is declared unconstitutional. By invalidating the exemption, the sales of religious periodicals become subject to tax. Texas Monthly would still be responsible for the tax and could not recover the amount it paid.

In *Arkansas Writers' Project*, religious, professional, trade and sports journals and/or publications printed and published within the state and sold through regular subscriptions were exempted from the Arkansas sales and use tax. General interest publications were not exempt. Arkansas Writers' Project published a general interest publication and paid the tax together with one or two other Arkansas publications.

The Minnesota Sales Tax Act in *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, supra, exempted the sale of newspapers and other publications. It also exempted the first $100,000 of purchases of paper and ink products consumed in the production of publications but imposed a special use tax on purchases of paper and ink products exceeding $100,000 in a calendar year. The effect of the statute was that in 1974, 11 publishers, producing 14 of the 388 paid circulation newspapers in the state, paid the tax. In 1975, 13 publishers, producing 16 out of 374 paid circulation papers, paid the tax. The Star Tribune was one of the 11 and 13 publishers paying the tax and it paid two-thirds of the total revenue raised by the tax for each of the two years. Minnesota's special use tax was determined to be in violation of the First Amendment because it singled out the press for special treatment and because it also targeted a small group of newspapers. The court looked to the effect of the tax in deciding there was no satisfactory justification for it.

In *Arkansas Writers' Project*, the court found that selective taxation of the press, which it defined as either singling out the press as a whole or targeting individual members of the press, poses a danger of abuse by the state. The question in the case as noted by the court was whether the tax targeted a small group within the press. 107 S.Ct. at 1727. In deciding this question affirmatively, the court said: "Because

the Arkansas sales tax scheme treats some magazines less favorably than others, it suffers from the second type of discrimination identified in *Minneapolis Star*." 107 S.Ct. at 1727.

The court went on to state the case involved a more disturbing use of selective taxation; a magazine's tax status depends entirely on its content. Under the *Ragland* decision, the Comptroller asserts content discrimination applies to a tax provision only when the press is singled out to be subject to a tax or a small group of the press is targeted by a tax. The Texas Sales Tax Act taxes all magazines. It does not tax magazines based on their content. It exempts them on this basis, but only if they are periodicals published or distributed by a religious faith and consisting wholly of writings promulgating the teachings of the faith or books consisting wholly of writings sacred to a religious faith. Texas Tax Code Section 151.312.

During a part of the period in controversy, 20 to 30 magazine publishers paid an estimated amount of two million five hundred thousand dollars in tax ($2,500,000) to the State of Texas on magazine subscription sales. J.A. 99-101. This number is substantially in excess of the number of magazine or newspaper publishers in either *Arkansas Writers' Project or Minneapolis Star*.

The only two types of selective taxation identified in *Arkansas Writers' Project* are (1) singling out the press as a whole for different treatment and (2) targeting individual members of the press for taxation. The court clearly stated that the issue was whether the Arkansas tax targeted a small group within the press. Within the small group, content discrimination occurred and caused even more selective taxation violative of the First and Fourteenth Amendments.

Texas does not target a small group of magazines to subject them to tax on their magazine subscription sales. There is no selective content taxation of certain magazines by taxing all types of magazines and exempting one type.

There are at least two competing constitutional interests involved in this case, the press and religion. Previous cases have not addressed the issues presented in this appeal.[3]

The Austin Court of Appeals applied a rational basis standard in upholding the exemption in Tex. Tax Code Section 151.312. The court correctly used this standard since the exemption and not the tax is in issue and since the tax was general in nature and the exemption was an exception. A state legislature is not bound to tax every member of a class or none at all. The legislature may make distinctions of degree having a rational basis. An exemption, when subjected to judicial scrutiny, must be presumed to rest on a rational basis if any state of facts would support such basis. *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495 (1936).

Texas Monthly argues by assuming there is content discrimination that the Comptroller must prove "a compelling state interest" and must demonstrate that the statute is "narrowly drawn" to achieve that interest. Section 151.312 meets either a

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[3]As additional argument, the Comptroller submits that when a statute is challenged on the basis it favors religious speech, it should be analyzed only under the Free Exercise Clause and the principle of neutrality and not under other constitutional grounds. Cf. *Thomas v. Review Board of the Indiana Employment Security Division*, 450 U.S. 707 (1981). *Johnson v. Robison*, 415 U.S. 360 (1974). (Requiring neutrality only among religious as opposed to secular beliefs.)

rational basis or a compelling state interest test because this provision helps to accommodate religion, to reinforce the desired separation of church and state, it attempts to avoid an excessive entanglement with religion and it also attempts to avoid a violation of the Free Exercise Clause.

The State has a definite compelling interest in accommodating religion. Section 151.312 helps effectuate accommodation and is narrowly drawn.

A state has a compelling interest in not violating the Establishment or Free Exercise Clauses of the First Amendment of the United States Constitution, because these are preferred rights. "The course of constitutional neutrality in this area cannot be an absolutely straight line." *Walz v. Tax Commission*, 397 U.S. at 669.

In *Lemon v. Kurtzman*, supra, this court set out a three part test to determine whether a statute violates the Establishment Clause:

> First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, ... finally, the statute must not foster "an excessive government entanglement with religion."

A statute violating the Establishment and Free Exercise Clauses is invalid in the same respect as is a statute violating the Equal Protection and Free Press and Free Speech Clauses. Texas has a rational basis for Section 151.312, which is to try to avoid violations of these provisions. If Section 151.312 is held unconstitutional, the compelling state interests it serves is to accommodate religion, to provide neutrality toward religion and to try to avoid violations of the

Establishment and Free Exercise Clauses. Section 151.312 is narrowly drawn to achieve that end.

Under the Establishment Clause, sponsorship, financial support and active involvement are to be avoided. According to *Walz v. Tax Commission*, 397 U.S. at 676, a tax exemption for religious property was determined to restrict the fiscal relationship between church and state and to reinforce a desired separation between them. The granting of such an exemption is not sponsorship because the state is not transferring part of its revenue to the church but simply abstaining from demanding the church support the state. 397 U.S. at 675. In other words, an exemption for religious publications allows the state to remain neutral toward religion. It neither advances nor inhibits religion. If an exemption for property of a religious group used exclusively for religious purposes does not advance or inhibit religion, certainly an exemption for periodicals consisting wholly of writings sacred to a religious faith would not. There is only a minimal involvement between the two but far less than taxation. The state has a definite compelling interest in remaining neutral in this area and Art. 151.312 helps effectuate that neutrality.

The exemption for religious periodicals does not create an excessive entanglement with religion. If sales of such periodicals were taxable and the seller became delinquent in the collection and payment of tax on these sales, the Comptroller of Public Accounts would under his normal collection process file tax liens against the property of the seller under Texas Tax Code Section 113.002 (Motion to Affirm or Dismiss, App. 4), issue notices to freeze money in bank accounts under Texas Tax Code Section 111.021 (Motion to Affirm or Dismiss, App. 5) and if property were owned by the seller, could by extra judicial procedures seize and sell the property to satisfy the tax debt pursuant to Texas

Tax Code, Section 111.017 (Motion to Affirm or Dismiss, App. 8). Elimination of the exemption would tend to expand the state's involvement in this area. *Walz v. Tax Commission*, 397 U.S. at 674.

Texas Monthly attempts to evade this argument by asserting that no general exemption for items sold by religious organizations exists and the spectre of tax liens and other collection procedures exist for sales of candles, crucifixes, canned goods or clothes even if the exemption for religious publications does not exist. In fact, however, the Texas Sales and Use Tax Act has a general exemption for the sale of food, meals, soft drinks and candy "by churches or at functions of churches." Texas Tax Code Section 151.314(e)(2). This exemption encompasses canned goods since they come within the definition of "food" in Section 151.314(c). Religious organizations can make a one day sale during a calendar year of any types of items without collecting the tax. (Motion to Affirm or Dismiss, App. 1) By exempting sales of food by churches and religious publications, the state has exempted items to be sold in large quantities and for larger amounts, which would occasion collection action for a tax collector.

In any case, it begs the issue to say that a spectre of tax collection action currently exists on other sales. If the state has the power, the problem is present. The Texas Legislature has the power to draw lines in the area of taxation. It has decided that in order to accommodate religion, it should grant an exemption for religious periodicals. The state should not be placed in the position of completely taxing religion or not taxing it at all. So long as the bases for its treatment are rational, and they are, they should be sustained.

Without the presence of Section 151.312, a violation of the Free Exercise Clause may occur.

Persons, such as Jehovah's Witnesses, are engaged in disseminating their message by selling religious publications door to door. The spreading of one's religious beliefs through distribution of religious literature is a type of evangelicism with a high claim to constitutional protection. *Murdock v. Commonwealth of Pennsylvania*, supra. A state tax levied and collected as a condition to the pursuit of this type of activity violates the Free Exercise and Free Press liberties of the First Amendment. 319 U.S. at 114. The Texas Sales and Use Tax Act without Section 151.312 would appear by its terms to place the same restraints and result in a constitutional violation.

These reasons serve as rational bases for the exemption appearing in Texas Tax Code Section 151.312 and also compelling state interests if it were declared unconstitutional.[4]

If this Court interprets *Ragland* as prohibiting the state on the basis of content discrimination from taxing publishers of all publications and from exempting religious publications at the same time, the Comptroller respectfully submits the decision cannot be reconciled with *Regan v. Taxation With Representation*, 461 U.S. 540 (1983), *Buckley v. Valeo*, 424 U.S. 1

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[4]The Comptroller respectfully submits that consideration should be given to the effect on periods beginning with October 1, 1987 if Section 151.312 is invalidated. Once invalidated, Section 151.312 would have no further legal existence. It was not re-enacted by the Texas Legislature to become effective October 1, 1987. If invalidated by this Court, beginning October 1, 1987, all subscription sales of magazines for a semi-annual or longer period and entered as second class mail would be exempt (Texas Tax Code 151.320); however, sales of religious periodicals would be taxable. Even if some religious periodicals might qualify for the magazine subscription sales exemption, others would not. Subsequent content based discrimination would result from attempting to correct previous content based discrimination.

(1976), and *Harris v. McRae*, 448 U.S. 297 (1980) and should be overruled for the reasons discussed by Justice Scalia in his dissent in *Arkansas Writers' Project Inc. v. Ragland*, supra.[5]

III. SECTION 151.312 DOES NOT CONSTITUTE A "LAW RESPECTING AN ESTABLISHMENT OF RELIGION."

The Court of Appeals noted in its decision that Texas Monthly addressed the Establishment Clause of the First Amendment but only as part of its Equal Protection analysis. J.S. App. 3. Texas Monthly now raises the separate argument that Section 151.312 per se violates the Establishment Clause of the First Amendment. The decision of the state court will not for that reason relate to Texas Monthly's arguments before this court.

The Constitution affirmatively mandates accommodation, not merely tolerance, of all religions and forbids hostility toward any. *Lynch v. Donnelly*, 104 S.Ct. 1355, 1359 (1984). Accommodation is not just permitted but is required. Where the aim of a statute is to accommodate religion, the tests in *Lemon* should not be rigidly applied so accommodation can be accomplished. If this accommodation is not afforded, there may be intrusion on the state's interest in promoting the First Amendment's guaranty of free exercise of religion. 104 S.Ct. at 1359.

Section 151.312 meets the three part test set out in *Lemon v. Kurtzman* to determine whether a statute

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[5]The hazards of an overbroad reading of *Arkansas Writers' Project*, which Justice Scalia predicted, have occurred. 107 S.Ct. at 1732. See *Bullfrog Films Inc. v. Wick*, No. 86-6630 (9th Cir. May 17, 1988.)

violates the Establishment Clause. First, the Section has a secular legislative purpose: to accommodate religion, be neutral toward it, not promote it. This Court has invalidated legislation on the ground a secular purpose was lacking only when it has concluded there was no question that the statute was motivated wholly by religious considerations. *Lynch v. Donnelly*, 104 S.Ct. at 1362.

The secular purpose requirement is aimed at preventing the government from abandoning neutrality and acting with the intent of promoting a particular point of view in religious matters. *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints et al v. Christine Amos,*. 107 S.Ct. 2862, 2868 (1987). The purpose of Section 151.312 is neutrality toward religion. Although the broader exemption in *Walz* provides a clearer case of nonsponsorship than Section 151.312, the neutrality toward religion effected by the grant of this exemption is just as evident.

The exemption does not have the primary effect of advancing or inhibiting religion ("effects test"). It creates under *Walz* only a "minimal and remote involvement between church and State and far less than taxation of churches." 397 U.S. at 677. In *Walz* this Court held *"There is no genuine nexus between tax exemption and establishment of religion."* 397 U.S. at 677 (emphasis supplied).

The fact religion may receive an unintended benefit does not mean Section 151.312 is advancing religion. The supplying of costly teaching materials is not a legislative aid to religion. 397 U.S. at 672. See *Board of Education of Central School Dist. No. 1 v. Allen*, 392 U.S. 236, 248 (1968). If these materials are not an aid to religion, an exemption for sales of religious periodicals should not be classified as such.

In *Corporation of the Presiding Bishops of the Church of Jesus Christ of the Latter-Day Saints et al v. Christine Amos*, 107 S.Ct. at 2869, the Court found unpersuasive the lower court's reliance on the fact the statute in issue singled out religious entities for a benefit. It held that although the court had given weight to this consideration in the past, it had never indicated that statutes that give special consideration to religious groups are per se invalid. "That would run contrary to the teaching of our cases that there is ample room for accommodation of religion under the Establishment Clause." 107 S.Ct. at 2869.

The question is whether the principal or primary effect of Section 151.312 is to advance religion. *Tilton v. Richardson*, 403 U.S. at 679. "But bus transportation, textbooks, and tax exemptions all gave aid in the sense that religious bodies would otherwise have been forced to find other sources from which to finance these sources. Yet all of these forms of governmental assistance have been upheld." 403 U.S. at 679. Section 151.312 likewise does not have the primary effect of advancing religion.

After a determination is made, if any, regarding the entitlement to the exemption, there is no further involvement between the State and the church. The government may accommodate religious practices without violating the Establishment Clause. *Hobbie v. Unemployment Appeals Commission of Florida et al*, 107 S.Ct. 1046, 1051 (1987). The testimony indicates the agency administering the tax, the Comptroller of Public Accounts, interprets Section 151.312 in such a manner that the parties to the sale transaction make the decision on whether the sale is exempt under Section 151.312. A law is not unconstitutional simply because it allows churches to advance religion. "But religious groups have been better able to advance their

purposes on account of many laws that have passed constitutional muster: for example, the property tax exemption at issue in *Walz v. Tax Comm'n*, supra, or the loan of school books to school children." Cor*poration of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints et al v. Christine Amos*. 107 S.Ct. at 2868.

An important concern of the effects test is "whether the symbolic union of church and state effected by the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement and the nonadherents as a disapproval, of their individual religious choices." *Grand Rapids School District v. Ball*, 105 S.Ct. 3216, 3226 (1985). A program of releasing students to attend voluntary religious instruction off premises of a public school did not have a symbolic union reflecting an endorsement of religion. *Zorach v. Clauson*, 343 U.S. 306, 313-314 (1952). A provision exempting the voluntary purchase or sale of all religious periodicals likewise does not present a symbolic union endorsing religion.

A tax exemption has been called a form of subsidy. Although like a cash subsidy it is not identical to a cash subsidy. *Regan v. Taxation With Representation of Washington*, 461 U.S. at 543. Tax deductions encompassing exemptions from property tax for property used for wholly religious purposes may benefit substantially religious institutions. "The Court's holding in *Walz v. Tax Comm'n* indicates, however, that this does not require the conclusion that such provisions of a state's tax law violate the Establishment Clause." *Mueller v. Allen*, 463 U.S. at 396.

The third test is whether the statute creates an excessive entanglement with religion. Texas Monthly

asserts the statute on its face requires excessive government entanglement with religion because it requires the state to determine (i) whether the publisher or distributor is a "religious faith" and (ii) whether the contents of the publication consist "wholly of writings promulgating the teachings of the faith."

Section 151.312 does not create an excessive entanglement with religion. This Court in *Walz v. Tax Commission*, supra, determined that a property tax exemption for property owned by a religious organization and used exclusively for religious purposes did not create an excessive entanglement with religion. If having to determine whether property is being used exclusively for religious purposes does not cause an excessive entanglement to exist, then determining whether a publisher is a religious faith and the contents of the publication are wholly writings promulgating the teaching of that faith should be no more a violation.

In *Board of Education of Central School Dist. No. 1 v. Allen*, supra, and *Mueller v. Allen*, supra, the loan of secular textbooks to parents or children attending nonpublic schools, though state officials were required to determine whether particular books were or were not secular, was held not to violate the entanglement test under the Establishment Clause. In making their decision, the state officials were required to review content of publications. There was no continuing state surveillance present in merely reviewing the contents of the publications. *Mueller v. Allen*, 463 U.S. at 403.

The only possible difference Texas Monthly could assert between the Section 151.312 review and the review in these cases would be one of time interval-frequency. In the case of school books, the review

would probably be once a year; where as, religious publications might be more frequent. This distinction has no substance. From the view of a tax administrator, it would be impractical to have to make too many reviews of a publication. The cost of administration for such an exemption could not be justified.

In determining whether there has been entanglement, the implementation of the statute by the agency administering Section 151.312 and its adoption by the state court should be considered. Ms. Wanda Hutcheson, Supervisor for Sales Tax Policy for the Office of the Comptroller of Public Accounts, testified to the Comptroller's administration of Section 151.312:

> Q. And that there is no system to submit a magazine to you to determine whether it's exempt or not, is there?
>
> A. Other than just sending it in, no, sir.
>
> Q. Has that happened?
>
> A. Magazines, not to my knowledge.
>
> Q. What's been sent in?
>
> A. I think what is sent in normally is the organization itself will give us the name of what is being published and ask us if that particular publication qualifies for a sales tax exemption.
>
> Q. And you decide?
>
> A. No, sir. What we normally do is to see if the organization itself is a religious organization.

Q. And if the religious organization anything they publish you let come out under that exemption?

A. What we tell them is we leave it to (p. 72) them to decide whether or not it's a religious a publication or periodical that teaches their faith. We do not make that determination.

Q. Because there's no you don't have any authority to make it in advance of somebody trying to collect the tax from them?

A. Well, I think it's mainly just because we don't want to get involved in deciding whether something is sacred to a religious faith or not.

Q. But if I go out and say I'm a religious faith and I want to publish a magazine that, I say, is sacred to me and I publish it, I don't have to come to you and get an exemption? I just start publishing it?

A. That's correct. After it's been established that you are, in fact, a religious organization, we do not pursue it any further.

Q. And if it's a religious -- and you decide on whether it's religious or not?

A. Tax administration does, yes, sir.

Q. And that's something they look at what people say and how they act and what they do to determine whether they're, quote, a religious faith?

> (p. 74) A. There are some guidelines that are set up to determine whether or not an organization is--qualifies as a religious organization.
>
> J.A. 60-61

The Comptroller's policy has been in effect for at least 12 years. J.A. 416-417. Under Texas law when a statute is ambiguous, the agency construction of the statute should be followed. *Federal Crude Oil Co. v. Yount Lee Oil Co.*, 122 Tex. 21, 52 S.W.2d 56, 62 (Tex. 1932), *Lumbermen's Underwriters v. State Board of Insurance*, 502 S.W.2d 217, 220 (Tex. Civ. App.-- Austin 1973, writ ref'd n.r.e.); and *Davis Kemp Tool Co. Inc. v. Bullock*, 584 S.W.2d 579 (Tex. Civ. App. Beaumont, writ ref'd n.r.e.) per curiam, 590 S.W.2d 708 (Tex. 1979). The provisions of Section 151.312 are ambiguous. What is a book consisting wholly of writings sacred to a religion or religious faith? In recognition of this ambiguity, the Comptroller has not attempted to decide what publications qualify under Section 151.312. The Comptroller's construction should be accepted under existing state law. It is a reasonable construction of the exemption and one that does not involve an excessive entanglement with religion.

Although the agency construction of Section 151.312 does not appear in its rule (34 Tex. Admin. Code Section 3.299(d)), State law is that an agency's interpretation of its own rule is to be considered part of the rule. *Texarkana and Ft. S. Ry. Co. et al v. Houston Gas & Fuel Co.*, 121 Tex. 594, 51 S.W.2d 284, 287 (1932); *Lawyers Title Ins. Corporation v. Board of Ins. C[illegible]n'rs et al.* 207 S.W.2d 972, 976 (Tex. Civ. App.-- Austin 1948, writ ref'd n.r.e.). The State court was properly entitled to rely on the agency construction.

In summary, due to its passive nature, Section 151.312 does not create the ongoing partnership between the State and religion presented by direct aid. Once the sale of the publication is determined to be exempt there is no further action needed by the state or religion. The nature of the exemption is such that the comprehensive and continuing state surveillance forbidden in *Lemon v. Kurtzman*, supra, is not present. Further, the administration of Section 151.312 prevents state involvement.

Article 151.312 meets all three tests and is constitutional.

CONCLUSION

The Comptroller respectfully submits that Texas Monthly does not have standing to attack Tex. Tax Code Section 151.312 and respectfully moves the Court to dismiss the appeal, or, in the alternative, to affirm the judgment entered in the cause by the Court of Appeals, Third Supreme Judicial District, Austin, Texas, or further in the alternative, if this Court determines Section 151.312 is unconstitutional, to invalidate this Section and deny recovery to Texas Monthly.

Respectfully submitted,

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